IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

FAIR POLITICAL PRACTICES COMMISSION, Plaintiff/Appellant, vs. SANTA ROSA INDIAN COMMUNITY OF THE SANTA ROSA RANCHERIA dba PALACE BINGO AND PALACE INDIAN GAMING, Defendant/Respondent.	C044555 Sacramento County Superior Court Case No. 02AS04544 Honorable Joe S. Gray

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DATED: January 13, 2004

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By: _____

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INTRODUCTION

This case involves the Santa Rosa Rancheria Tachi Yokut Tribe's ("Tribe") inherent immunity from suit. The Fair Political Practices Commission ("FPPC") brought an unauthorized civil suit against the Tribe seeking to enforce the California Political Reform Act ("PRA") against the Tribe. The Tribe opposed the FPPC's unwarranted assertion of jurisdiction.

On April 24, 2003 the Superior Court of California in and for the County of Sacramento (hereinafter "the Superior Court") granted the Tribe's motion to quash. In its order the Superior Court recognized that the Tribe's inherent immunity from suit is the critical issue in this case. (Clerk's Transcript, (hereinafter "CT") p. 451). Thus, the Superior Court ruled, absent a valid waiver of immunity, the Tribe is "presumptively immune from suit." (CT, p. 455).

The Superior Court's ruling is consistent with the United States Supreme Court's sovereign immunity jurisprudence as expressed most recently in *Kiowa Tribe v. Manufacturing Technologies, Inc.* (1998) 523 U.S. 751, 760 and in *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe* (1991) 498 U.S. 505, 509. Further, the ruling below is consistent with this Court's own precedent as established in *Redding Rancheria v. Superior Court*, (2001) 88 Cal.App.4th 384. Consequently, this Court should affirm the ruling below and deny the FPPC's appeal.

COUNTER STATEMENT OF THE CASE

From the outset of this action, the FPPC has continually asserted that this case presents a question of first impression with regard to the application of tribal sovereign immunity. (CT, p. 32; Appellant's Opening Brief, (hereinafter "AOB") p. 2). The FPPC argues that the doctrine of tribal sovereign immunity does not apply in an instance where the State claims there is an unsubstantiated threat to the integrity of the state political process. (AOB, pp. 1-2). The FPPC's position is untenable. As recognized by the Superior Court, the issue is not whether the doctrine of tribal sovereign immunity applies, rather the critical and determinative question is whether the FPPC can overcome the Tribe's presumptive immunity from suit when neither the Tribe nor Congress has expressly waived the Tribe's immunity. (CT, pp. 450-452). This does not present a question of first impression. The FPPC's attempt to reframe the issue by implicating the Tenth Amendment and Guaranty Clause does not change this fact.

The issue of tribal sovereign immunity, as the Superior Court recognized, is settled. (CT, pp. 450-452). No case has ever held that tribal sovereign immunity is a discretionary doctrine that courts are free to disregard depending on the nature of the case. Rather, the United States Supreme Court, federal courts, and this very California Court of Appeal have all recognized that tribal sovereign immunity is

a mandatory doctrine barring unconsented suits against an Indian tribe that a court must recognize in every instance. This is not a question of first impression.

Undeniably, the State of California and the FPPC place great importance on this case. However, in its approach to this case, the FPPC obfuscates the true issues of this case by focusing the Court's attention on inapplicable constitutional provisions, red herring arguments, and inappropriate suggestions of the Tribe's intention to corrupt the government of the State of California. (CT, pp. 43-46, 56). These issues, highlighted throughout the FPPC's argument, are extraneous to the issue of the Tribe's inherent sovereign immunity from suit, which is the determinative factor in this case.

Not only are the FPPC's arguments inapplicable to the critical issue of this case, but the FPPC's enforcement action itself is unnecessary. The FPPC has a number of other avenues that would satisfactorily allow it to comply with its statutory mandate, while simultaneously respecting the Tribe's status as a sovereign without running afoul of the doctrine of tribal sovereign immunity. The FPPC, however, has consistently refused to consider any approach other than one prohibited by fundamental tenets of federal Indian law.

SUMMARY OF THE ARGUMENT

Under established law the Tribe is presumptively immune from suit. Tribal sovereign immunity is a mandatory doctrine that courts

have no choice but to recognize. Tribes are immune from suit in every instance irrespective of the merits of a claim or the particular interests of the party bringing the action against the Tribe. Moreover, tribal sovereign immunity is not subject to diminution by the States. It does not matter that the State, or an agency thereof, initiates a suit against a tribe to protect important state interests. Absent a valid waiver of immunity, a tribe may not be sued, even by the State.

Further, the Tribe, which is a non-federal entity, cannot violate the Tenth Amendment or the Guaranty Clause. Thus, to the extent the FPPC bases its claims on such a violation it has brought suit against the wrong party. Nonetheless, even if the FPPC had brought these claims against the United States, the proper party, it still could not prevail, as Congress does not violate the Tenth Amendment by continuing to recognize the applicability of the doctrine of tribal sovereign immunity.

ARGUMENT

I. THE TRIBE IS IMMUNE FROM SUIT

Under established United States Supreme Court jurisprudence, the Tribe is presumptively immune from any compulsory state processes, including this suit to enforce the PRA against the Tribe. The entirety of the FPPC's opening brief suggests that tribal sovereign immunity is a limited doctrine that courts may recognize in their discretion depending on the circumstances or equities of a particular

case. (AOB, pp. 27-32). With this argument, the FPPC confuses the limitations that have been imposed on the scope of a tribe's overall sovereignty with the Tribe's continued retention of absolute immunity from suit absent a clear, express, and unequivocal waiver of tribal sovereign immunity. As the Superior Court below correctly recognized, irrespective of any federal diminution of a tribe's sovereignty as an absolute bar to State ***regulatory*** authority, there has been no corresponding reduction in the force of the Tribe's inherent ***sovereign immunity from suit***. (Tribe's Request for Judicial Notice "RJN", Ex. A., pp. 4-5;CT, p. 451)

A. The State's Ability To Regulate Tribal Activity Does Not Allow The State To Sue A Tribe.

Federal law with regard to ***regulation*** of Indian affairs has devolved to a point where States have acceded to more ***regulatory*** authority over the ***off reservation*** activities of tribes, than once was possible. The rights of tribes vis-à-vis the States began by the United States Supreme Court declaring tribes to be domestic dependent nations, over which laws of the State have no force. *Worcester v. Georgia* (1832) 31 U.S. 515, 561 (citing *Cherokee Nation v. Georgia* (1831) 30 U.S. 1, 17-18).

Since the United States Supreme Court's decisions in *Cherokee Nation* and *Worcester*, tribal status under federal Indian law has regressed from an absolute bar to a State's ***regulatory*** authority to a

substantial bar to jurisdiction that a State may overcome in certain situations. As the Superior Court noted, in relatively recent times, federal case law departed from the original conception in *Worcester* and undertook to determine whether federal statutes and treaties preempted State authority over tribal affairs. (RJN, Ex. A, pp. 4-5; CT, p. 451) (citing *McClanahan v. Arizona Tax Comm'n* (1973) 411 U.S. 164, 172). This case law recognizes, absent an express statutory grant, a State's ***regulatory*** authority over off reservation activities is now determined by balancing the competing tribal, federal and state interests, with the Tribe's status as a domestic sovereign forming a critical backdrop from which any such balancing of interests begins.[1] (RJN, Ex. A, pp. 4-6; CT, pp. 450-452).

Further, as the Superior Court recognized, the shift to the preemption analysis has, at times, resulted in the application of State laws to the activities of tribes. (RJN, Ex. A, p. 4; CT, p. 451). However, this shift does not in any way result in a judicial jettisoning of the underlying notion of a tribe's inherent immunity or the presumption that State laws have no force or effect when applied to

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[1] Again, it is important to note that this discussion of a State's regulatory authority is undertaken to illustrate the distinction between the State's power to regulate tribal activities and the State's power to enforce those regulations against a tribe through compulsory state court processes. While the State's regulatory authority is irrelevant with respect to the State's ability to initiate a suit against a tribe, the Tribe does not concede, and indeed opposes any suggestion, that it is subject to regulation by the State under the PRA.

Indian tribes. (CT, p. 451); *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.* (1998) 523 U.S. 751, 754 ("*Kiowa*"); *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe* (1991) 498 U.S. 505, 510 ("*Potawatomi*"). More importantly, this preemption analysis has no bearing whatsoever on the inherent immunity of a tribe from suit. (RJN, Ex. A, p. 4; CT, p. 451). This is because "a state's power to regulate a tribe's conduct is not the same as the state's power to sue a tribe." *Redding Rancheria v. Superior Court* (2001) 88 Cal.App.4th 384, 387 (citing *Potawatomi*, 498 U.S. at 511-14); *Kiowa*, 523 U.S. at 754.

Thus, as the Superior Court below recognized in granting the Tribe's motion to quash, it is irrelevant whether the State is authorized to regulate tribal activity under the PRA. (CT, pp. 451-52). The Superior Court recognized in dismissing the FPPC's Complaint that the court need not and does not decide whether the State is authorized to impose PRA reporting requirements on the Tribe. (RJN, Ex. A, pp. 4-6; CT, p. 451). Rather, it is the Tribe's sovereign immunity from suit, and not the State's regulatory authority that is the determinative issue of this case. (CT, p. 451). The Superior Court's ruling on this issue is fully in accord with the United States Supreme Court's most recent decisions on the application and reach of tribal sovereign immunity. *Kiowa*, 523 U.S. at 754; *Potawatomi*, 498 U.S. at 510.

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B. Tribal Sovereign Immunity Is Absolute.

The United States Supreme Court has consistently held that tribes, like all other sovereigns, enjoy immunity from suit absent their consent or authorization from Congress. *See e.g., United States v. United States Fidelity & Guaranty Co.* (1940) 309 U.S. 506, 512 ("Indian Nations are exempt from suit without Congressional authorization."); *Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 58 ("Indian tribes have long been recognized as possessing the same common-law immunity from suit traditionally enjoyed by sovereign powers") (citations omitted). The Court has found that tribal sovereign immunity is a "necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of Berthold Reservation v. Wold Engineering* (1986) 476 U.S. 877, 890 ("*Three Affiliated Tribes*"). In 1998, the United States Supreme Court reiterated this position, stating that "[a]s a matter of federal law, an Indian tribe is subject to suit ***only*** where Congress has authorized the suit, or the tribe has waived its immunity." *Kiowa*, 523 U.S. at 754 (emphasis added). The Court applied the doctrine again most recently in *C & L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe of Oklahoma* (2001) 532 U.S. 411, 418.

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1. The United States Supreme Court Has Declined to Limit The Doctrine of Tribal Sovereign Immunity.

In recent years the United States Supreme Court has been invited to limit the application and scope of tribal sovereign immunity or to eliminate the doctrine in its entirety. The Court has declined all such requests. In *Potawatomi,* the Court explained that:

> Congress has always been at liberty to dispense with such tribal immunity or to limit it. Although Congress has occasionally authorized limited classes of suits against Indian tribes, . . . Congress has consistently reiterated its approval of the immunity doctrine. *See e.g.*, Indian Financing Act of 1974, 88 Stat. 77, 25 U.S.C. §1451 *et seq.*, and the Indian Self-Determination and Education Assistance Act, 88 Stat. 2203, 25 U.S.C. §450 *et seq*. These Acts reflect Congress' desire to promote the "goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *California v. Cabazon Band of Mission Indians* (1987) 480 U.S. 202, 216. Under these circumstances, we are not disposed to modify the long-established principle of tribal sovereign immunity.

Potawatomi, 498 U.S. at 510.

In *Kiowa*, the Court noted that the tribal immunity doctrine is "settled law" and once again declined the invitation to limit it, citing Congress' past reliance on the doctrine and power to alter it when it deems it necessary. *Kiowa,* 523 U.S. at 756, 758-59. The *Kiowa* Court did express concerns about the doctrine of tribal sovereign immunity. The Court acknowledged that the doctrine was created

almost by accident and questioned whether the doctrine was outdated in current times. *Id.* at 756-58. Nonetheless, the Court unequivocally refused to modify the doctrine. Instead, as the court below recognized, the United States Supreme Court, in *Kiowa* sustained the immunity doctrine in the broadest of terms, "even where the suit at issue seeks to enforce state laws that States are federally authorized to impose upon tribes." (CT, p. 452). Indeed when presented the opportunity to limit the doctrine, the United States Supreme Court concluded that such an action was a matter best resolved by Congress. *Kiowa,* 523 U.S. at 758-60.

Similarly, the United States Supreme Court has repeatedly held that the immunity doctrine, which insulates tribes from compulsory state court processes, is not subject to state control. *Kiowa,* 523 U.S. at 754-56; *Potawatomi,* 498 U.S. at 509-11; *Three Affiliated Tribes,* 476 U.S. at 891; *Puyallup Tribe v. Dept. of Game of State of Washington* (1977) 433 U.S. 165, 172-73. In *Three Affiliated Tribes*, the Court made clear that:

> [I]n the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States.

Three Affiliated Tribes, 476 U.S. at 891. Relying on this principle, the Court struck down a state statute conditioning a tribe's access to state courts on a waiver by the Tribe's sovereign immunity from all civil suits. *Id.* at 891.

2. Tribal Sovereign Immunity Is Not Subject To Diminution By The States.

Underlying this line of cases is the historical fact that, contrary to the FPPC's suggestion, tribal sovereign immunity is not the result of a grant from Congress. Rather, as the United States Supreme Court recognizes, tribal sovereign immunity is a critical aspect of the tribes' inherent sovereign that was not diluted by the United States Constitution and is retained in its full effect. *Idaho v. Coeur d'Alene Tribe*, (1997) 521 U.S. 261, 268 ("*Coeur d'Alene*"). Indian tribes were not represented at the Constitutional Convention. *Coeur d'Alene*, 521 U.S. at 268; *Blatchford v. Native Village of Noatak* (1991) 501 U.S. 775, 782 ("*Blatchford*"); *United States v. Wheeler* (1978) 435 U.S. 313, 322-23 ("*Wheeler*"). Therefore, within the text of the Constitution, Indian tribes did not give up ***any*** of their rights as sovereigns. *Coeur d'Alene*, 521 U.S. at 268; *Blatchford*, 501 U.S. at 782. Indeed, as the Court has noted repeatedly, after the signing of the Constitution, the tribes retained all aspects of their original sovereignty. *Wheeler,* 435 U.S. at 323.

The States, on the other hand, did divest themselves of numerous aspects of their sovereignty at the Constitutional Convention. *Montana v. Blackfeet Tribe* (1985) 471 U.S. 759, 764 ("*Blackfeet Tribe*"); *Morton v. Mancari*, (1974) 417 U.S. 535, 551-52 ("*Morton*"). One aspect of their sovereignty ceded by the States was

any remnant of their authority over all matters involving Indian tribes. *Blackfeet Tribe*, 471 U.S. at 759 ("The Constitution vests the Federal Government with exclusive authority over relations with the Indian tribes."); *Morton*, 417 U.S. at 551-51. Thus, while States are subject to and limited, by the Constitution, Tribes are not.

Tribal sovereignty, and more importantly tribal sovereign immunity, remains fully intact subject only to congressional limitations. The United States Supreme Court reaffirmed this principle in *Kiowa,* declaring that "tribal immunity is a matter of federal law and is not subject to diminution by the States." *Kiowa*, 523 U.S. at 756. Importantly, as the Court explained in *Kiowa*, statutes permitting state regulation of tribal or Indian activities have no impact on a tribe's absolute immunity from suit.

> Our cases allowing States to apply their substantive laws to tribal activities are not to the contrary. We have recognized that a State may have authority to tax or regulate tribal activities occurring within the State but outside Indian country. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973); *see also Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962). ***To say substantive state laws apply to off-reservation conduct, however, is not to say that a tribe no longer enjoys immunity from suit.*** In *Potawatomi* for example, we reaffirmed that while Oklahoma may tax cigarette sales by a Tribe's store to nonmembers, the Tribe enjoys immunity from a suit to collect unpaid state taxes. 498 U.S. at 510. ***There is a difference between the right to demand compliance with state laws and the means available to enforce them.*** *See id* at 514.

Kiowa, 523 U.S. at 755 (emphasis added); *see also Citizen Band of Potawatomi*, 498 U.S. at 513.

Contrary to the FPPC's arguments, tribal sovereign immunity is not voided by California's interest in initiating compulsory state court processes to enforce the PRA against the Tribe without the Tribe's consent. As the federal courts have recognized, it does not matter that it is the State that is attempting to bring suit against the Tribe to protect important State interests. *See Potawatomi*, 498 U.S. at 513; *Puyallup*, 433 U.S. at 165-73. The FPPC has pointed to no authority that overcomes the time-honored application of tribal sovereign immunity, even in instances when the State claims even the most substantial of interests.

California courts have similarly addressed the issue of tribal sovereign immunity. *See e.g. Redding Rancheria v. Superior Court* (2001) 88 Cal.App.4th 384 ("*Redding Rancheria*"); *Great Western Casinos, Inc. v. Morongo Band of Mission Indians* (1999) 74 Cal.App.4th 1407; *Trudgeon v. Fantasy Springs Casino* (1999) 71 Cal.App.4th 632; *Long v. Chemehuevi Indian Reservation* (1981) 115 Cal.App.3d. 853. This Court addressed the issue of tribal sovereign immunity from suit when it decided *Redding Rancheria*. In *Redding Rancheria*, the Tribe and a tribal commercial entity were sued in state court for a tort claim that arose off the reservation. *Redding*

Rancheria, 88 Cal.App.4th at 386. The Tribe moved to quash service of summons under California Code of Civil Procedure § 418.10 alleging that the Tribe and the tribal enterprise were immune from suit in state court. *Redding Rancheria*, 88 Cal.App.4th at 386. The Shasta County Superior Court denied the Tribe's motion. *Id.* at 386-87. This Court, on the Tribe's writ of mandate, overturned the Superior Court's ruling, holding that the doctrine of tribal sovereign immunity was an extremely broad doctrine that insulated the Tribe from suit in state court. *Id.* at 386-88.

In deciding *Redding Rancheria*, this Court acknowledged that "tribal immunity is a matter of federal law and is not subject to diminution by the States." *Id.* at 389 (citing *Kiowa*, 523 U.S. at 756). Thus, this Court recognized that an Indian tribe "is a sovereign nation and 'as a matter of federal law, . . . is subject to suit only where Congress has authorized the suit or the tribe has waived immunity." *Redding Rancheria,* 88 Cal.App.4th at 389 (citing *Kiowa*, 523 U.S. at 754; *Great Western Casinos, Inc. v. Morongo Band of Mission Indians* (1999) 74 Cal.App.4th 1407, 1419-20).

Like the United States Supreme Court in *Kiowa*, this Court in *Redding Rancheria,* was presented with arguments equivalent to those currently advanced by the FPPC. Specifically, the respondent in *Redding Rancheria* argued that tribal sovereign immunity did not apply to situations where there was no "tribal goal" associated with a

tribe's commercial enterprise. *Id.* at 388. This Court, as did the Court in *Kiowa*, resoundingly rejected the request to limit the scope of tribal sovereign immunity. *Id.*

Moreover, this Court recognized that the application of tribal sovereign immunity from suit does not include an inquiry into the degree of infringement on tribal sovereignty. Simply put, this Court has authoritatively recognized that the State's ability to regulate off-reservation activities has no bearing on the whether the State can initiate a suit against the Tribe to enforce those regulations. *Id.* Nor, under *Redding Rancheria* is there any balancing of interests associated with the application of tribal sovereign immunity. *Id.* Any such analysis is unnecessary due to this Court's pronouncement that:

> [A] state's power to regulate a tribe's conduct is not the same as a state's power to sue a tribe.

Redding Rancheria, 88 Cal.App.4th at 387 (citing *Potawatomi*, 498 at 505). Thus, this Court's established precedent is in complete accord with that of the United States Supreme Court.

C. Tribal Sovereign Immunity Is A Mandatory Doctrine.

As the law set forth above shows, tribal immunity from suit is a mandatory doctrine. Judicial recognition of tribal sovereign immunity is not a matter of deference to Congress but instead is compelled by the Tribe's retained sovereignty. *Three Affiliated Tribes,* 436 U.S. at 890-91; *Santa Clara Pueblo,* 436 U.S. at 57-58; *Wheeler,* 435 U.S. at 1086. Tribal sovereign immunity applies in every suit brought against

the Tribe irrespective of the nature of claimant or the particular issues of the case. *Wendt v. Smith*, (C.D. Cal 2003) 273 F. Supp. 2d 1078, 1082. Federal Courts have repeatedly and consistently confirmed these precise principles. *See e.g., Pan American Company v. Sycuan Band of Mission Indians* (9th Cir. 1989) 884 F.2d 416 ("*Pan American*"); *People of the State of California ex rel. California Department of Fish and Game v. Quechan Tribe of Indians* (9th Cir. 1979) 595 F.2d 1153 ("*Quechan*").

In *Quechan,* the court struck down the State of California's attempt to enforce state laws regulating fish and game on the Fort Yuma Indian Reservation. The State argued that it should be allowed to bring an action against the Tribe because enforcement of state fish and game laws against non-Indians on the reservation did not infringe on the Tribe's right to self-government. *Quechan*, 595 F.2d at 1154. The court rejected the State's argument despite the important interest the State had in protecting fish and wildlife within its boundaries. The court explicitly recognized that "the fact that it is the State which has initiated suit is irrelevant insofar as the Tribe's sovereign immunity is concerned." *Id.* at 1155 (citing *Puyallup Tribe*, 433 U.S. at 165-73).

The court continued:

> Although we may sympathize with California's need to resolve the extent of its regulatory power, the "desirability for complete settlement of all issues . . . must . . .yield to the principle of immunity.

Quechan, 595 F.2d at 1155 (citing *United States Fidelity & Guaranty*, 309 U.S. at 513). Further, the court noted:

> Sovereign immunity involves a right which courts have ***no choice***, in the absence of a waiver, but to recognize. ***It is not a remedy as suggested by California's argument, the application of which is within the discretion of the court.***

Quechan, 595 F.2d at 1155 (emphasis added).

In *Pan American*, the Ninth Circuit took precisely the same position. There the court responded to the plaintiff's argument that invoking the doctrine of tribal sovereign would leave it without judicially enforceable remedies for the Tribe's alleged breach of contract, stating:

> [I]ndian sovereignty, like that of other sovereigns, is not a discretionary principle subject to the vagaries of the commercial bargaining process or the equities of a given situation.

Pan American, 884 F.2d at 419.

The precedents of the United States Supreme Court, as well as the precedents of the California courts and this Court in particular, as discussed above undercut the FPPC's claim that the Tribe is subject to compulsory state court processes seeking to enforce the PRA against the Tribe. Thus, in accordance with established precedent that the court below properly recognized, under the applicable law the "Tachi Tribe is presumptively immune from the instant suit by the FPPC to

enforce PRA provisions . . . ." (CT, p. 450). The law is clear, irrespective of the FPPC's assertion to the contrary. Tribal sovereign immunity is a mandatory doctrine, which courts have no choice but to recognize in every instance. *Kiowa*, 523 U.S. at 755; *Potawatomi*, 498 U.S. at 513; *Pan American*, 884 F.2d at 419; *Quechan*, 595 F.2d at 1155; *Redding Rancheria*, 88 Cal.App.4th at 389.

Consequently, the nature or the equities of the claim are irrelevant with respect to the application of the doctrine of tribal immunity. *See Pan American*, 884 F.2d at 419. The Tribe's immunity from suit remains fully intact unless either Congress or the Tribe has waived immunity. Thus, contrary to the FPPC's assertions, the Court may not engage in a particularized balancing of interests in order to decide whether to respect to the Tribe's sovereign immunity. *Kiowa,* 523 U.S. at 755; *Pan American,* 884 F.2d at 419; *Quechan,* 595 F.2d at 1155. As this Court has expressly recognized, even if the State had the authority to regulate tribal activities that authority does not give the State the right to bring an enforcement action against the Tribe in state court. Only an clear waiver of immunity can do that.

As the Superior Court recognized, the Tribe did not waive its immunity from suit. (CT, p. 454). The Superior Court stated:

> A tribe's waiver of its immunity from suit cannot be implied on the basis of tribal conduct . . . . Thus, by voluntarily making state electoral campaign contributions, the Tachi Tribe has not subjected itself

> to suit by the State to enforce the PRA reporting requirements for such contributions.

(*Id.*). (citations omitted). The FPPC does not contest the lower court's ruling on the issue of the Tribe's waiver of sovereign immunity. This issue is settled.[2]

Thus, under the applicable precedent set forth above, tribal sovereign immunity is a mandatory doctrine that applies in every instance, irrespective of the nature of the claims against the Tribe, the identity of the party bringing suit, or the importance of any particular State interest. It is incontrovertible that the Tribe cannot be sued in any instance unless either the Tribe or Congress explicitly waives the Tribe's immunity in a manner that is clear and unambiguous. The Superior Court ruled, based on settled law, that the Tribe has not waived immunity. The FPPC does not contest that ruling on appeal. Therefore, under the applicable law the FPPC's suit against the Tribe to enforce provisions of the PRA is barred by the doctrine of tribal sovereign immunity.

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[2] As noted the FPPC did not contest the Superior Court's ruling that the Tribe did not waive its immunity from suit by making campaign contributions in California elections. Because this issue is not raised on appeal, the Tribe does not address it hence. In the event that this Court determines discussion of the issue of waiver necessary, the Tribe requests that the Court allow supplemental briefing on this issue.

II. THE TRIBE'S PARTICIPATION IN STATE POLITICAL PROCESSES DOES NOT VIOLATE THE TENTH AMENDMENT AND GUARANTY

The FPPC claims that enforcement of the PRA is an exercise of the powers reserved to the States under the Tenth Amendment and the Guarantee Clause contained in Article IV § 4 of the United States Constitution. (AOB, p. 13). The FPPC further asserts that the Tribe's invocation of its inherent immunity from the PRA's enforcement provisions constitutes a violation of powers reserved to the States under the Tenth Amendment and the Guarantee Clause. (AOB, p. 14). The thrust of the FPPC's argument is that Congress, through its refusal to abrogate tribal immunity by remaining silent on the issue, is acting in derogation of powers reserved to the States under the Constitution. (AOB, pp. 17-20). This position contravenes established tenets of both constitutional and federal Indian law.

A. The Tribe Cannot Violate the Tenth Amendment or The Guarantee Clause Which Provides Only For Federal Incursions on State Sovereignty.

The United States Supreme Court has considered the reach and application of the Tenth Amendment and Guarantee Clause on numerous occasions. The Court's jurisprudence on these constitutional provisions has consistently held that the Tenth Amendment protect States from acts of the ***federal government*** that infringe on powers reserved to the States under the Constitution. *Printz v. United States* (1997) 521 U.S. 898; *New York v. United*

States (1992) 505 U.S. 144 ("*New York*"). Appellants, however, do not identify a single case holding that the acts of a non-federal entity, such as the Tribe, can give rise to a violation of the Tenth Amendment.

Specifically, the Tenth Amendment limits the power of the ***federal government*** and reserves powers to the States. *See New York* 505 U.S. at 156-57. The Tenth Amendment states, in striking simplicity:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.[3]

U.S. CONST., amend. X. The United States Supreme Court has read the Tenth Amendment as to afford the States protection under certain circumstances from the ***federal government's*** unwarranted attacks upon States' rights. Thus, the Court has struck down numerous federal statutes seeking to impose federal laws and regulations directly on the States. *See e.g. New York,* 505 U.S. 144 (invalidating provisions of the Low Level Radioactive Waste Act); *Gregory v. Ashcroft* (1991) 501 U.S. 452 (upholding a Missouri constitutional provision against a challenge based on the federal Age Discrimination in Employment Act and Equal Protection Clause of the Fourteenth

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[3] As discussed in Section II(C) the federal government's authority over matters concerning Indian tribes stems directly from a constitutional grant and would thus negate the FPPC's claim against the federal government for violation of the Tenth Amendment.

Amendment); *Printz*, 521 U.S. 898 (invalidating provisions of the Brady Handgun Violence Protection Act imposing federal regulations on state law enforcement officials); *Oregon v. Mitchell* (1970) 400 U.S. 112 (invalidating provisions of the federal Voting Rights Act of 1965 making eighteen year olds eligible to vote in state and local elections). However, as the text of the Tenth Amendment and the related case law indicate, non-federal actors such as the Tribe simply cannot violate the Tenth Amendment.

Similarly, the Guarantee Clause protects States from ***acts*** of the ***state*** and federal ***government*** that intrude upon the rights of States to maintain for their citizens a republican form of government. *See Baker v. Carr* (1962) 369 U.S. 186, 222-27. The Guarantee Clause provides:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application to the Legislature, or of the Executive (when Legislature cannot be convened) against domestic violence.

U.S. CONST., art. IV, § 4. The Tribe, of course, constitutes neither a State, nor the federal government, and thus cannot violate this constitutional provision. *Baker v. Carr*, 369 U.S. at 222-27.

To the extent that the FPPC asserts claims alleging violations of the Tenth Amendment and the Guaranty Clause, the FPPC is pursuing this action against an improper party. The FPPC's claim is more

properly asserted against the United States. The FPPC has not claimed and cannot claim, that the Tribe has enacted legislation, or taken any other actions that limit either the State's reserved powers under the Constitution or that alter the republican form of the California government.[4]

Furthermore, the courts have continually held that claims based on the Guaranty Clause present non-justiciable political questions. *See e.g. City of Rome v. United States* (1988) 446 U.S. 156, 182, n.17; *Baker v. Carr* (1962) 369 U.S. 186, 218-29; *Colegrove v. Green* (1946) 328 U.S. 549, 556; *Pacific States Telephone & Telegraph v.*

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[4] Interestingly, the gist of the FPPC's argument and request for relief in this case rests on the unstated presumption that Congress is required to restrain the Tribe's inherent immunity from suit to avoid violating rights reserved to the States under the Tenth Amendment and the Guaranty Clause. As discussed above in Section I(B)(2) and again Section II(C) immediately following, tribal sovereignty and sovereign immunity does not originate with an act of Congress. *See Wheeler,* 435 U.S. at 323. Nevertheless, Congress does have plenary power over Tribes and their immunity from suit. *See Kiowa,* 523 U.S. at 755. In fact, as *Kiowa* instructs, unless the Tribe has granted a waiver of immunity, it is up to Congress to waive the Tribe's immunity through specific legislation. *Id.* Otherwise, there is no waiver and the Tribe is not subject to suit. *Id.*

Thus, in essence the only way this, or any court could grant FPPC the relief it seeks is to compel Congress to pass legislation restricting the Tribe's immunity. However, as this Court is well aware such a request presents a political question over which this no court has jurisdiction. *See e.g. Baker v. Car, (*1962) 369 U.S. 186; *I.N.S. v. Chada*, (1983) 462 U.S. 919, 941. The area of Indian affairs and of legislating within this area is clearly and exclusively committed to Congress and thus beyond the jurisdiction of the judicial department. *See e.g., Lone Wolf v. Hitchcock*, (1903) 187 U.S. 553, 565-68 ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.").

Oregon (1912) 223 U.S. 118-140-51. The United States Supreme Court has intimated that there may be some claims raised under the Article IV, Section 4 Guaranty Clause that might be justiciable. *Reynolds v. Simms* (1964) 377 U.S. 533, 582. However, the Court has not as of yet overruled the long standing principle of non-justiciability. *New York*, 505 U.S. at 185. In *New York*, the Court passed up its most recent opportunity to reverse the jurisprudence on this issue. 505 U.S. at 185. Thus, the FPPC's claims asserting a violation of the Guaranty Clause can be disposed of on this ground alone.

B. Congress Has Taken No Action That Violates The Tenth Amendment Or Guaranty Clause.

Even if the FPPC had initiated this suit against the United States, the FPPC still could not prevail on those claims. As the Superior Court appropriately noted, since congressional inaction cannot give rise to a violation of the Tenth Amendment, tribal immunity must remain intact through congressional silence. (CT, p. 453) (noting that current Tenth Amendment analysis is limited to review of "congressional enactments requiring the States to enforce a federal statutory scheme."). Here, Congress has taken no action with respect to enforcement of the PRA or any other matter. Congress has not passed legislation immunizing the Tribe from enforcement actions under the PRA. No such legislation is needed.

Moreover, Congress has not demanded that the State pass any legislation. As the FPPC concedes, Congress has remained entirely

silent with respect to the matters that the FPPC here claims constitute violations of the United States Constitution. Thus, Congress has done nothing that could be considered a violation of either the Tenth Amendment or the Guaranty Clause.

Leaving aside the foregoing defects in the FPPC's Tenth Amendment and Guaranty Clause arguments, their claims fail for an additional reason. Even if congressional silence could be determined to be an affirmative act subject to judicial review under the Tenth Amendment and the Guaranty Clause, Congress' "action" in failing to revoke tribal sovereign immunity is authorized by the Constitution's grant of complete control over Indian affairs to Congress. *See Gregory,* 501 U.S. at 460.

As the Superior Court recognized, the United States Supreme Court has held that Congress has the authority to legislate "even in areas traditionally regulated by the States so long as it is acting within powers granted it under the Constitution." (CT, pp. 453-54) (citing *Gregory v. Aschroft* (1991) 501 U.S. 452, 460). Thus, to the extent that congressional silence as to the continued applicability of tribal sovereign immunity could be deemed action, that action would not constitute a violation of either the Tenth Amendment of the Guaranty Clause because Congress' plenary authority over Indian tribes stems directly from the Constitution. With respect to this and its other claims relating to the application of tribal sovereign immunity, the

FPPC simply misunderstands the nature and scope of tribal sovereign immunity and the historical relationship between tribes, states and the federal government.

Through its misunderstanding of the nature of tribal sovereign immunity, the FPPC seems to suggest that tribal sovereign immunity is a congressionally created doctrine. Tribal sovereign immunity from suit is not a creature of congressional creation. A tribe's immunity from suit is an inherent attribute of the Tribe's preexisting sovereignty. *Three Affiliated Tribes*, 476 U.S. at 890-91; *Wheeler*, 435 U.S. at 322-330. As this Court as well as the United States Supreme Court has recognized tribal sovereign immunity remains fully intact unless Congress specifically acts to abrogate that immunity. *Kiowa,* 523 U.S. at 755; *Potawatomi,* 498 U.S. at 513; *Wheeler*, 435 U.S. 323; *Redding Rancheria,* 80 Cal.App.4th at 389.

C. Congress' Constitutional Grant of Power Over Indian Affairs Is Not Limited to "Indian Commerce."

The FPPC is confused regarding the historical relationship between tribes, states, the federal government and the United States Constitution. Contrary to the FPPC's suggestion, the constitutional grant of power over Indian affairs to Congress is not limited to matters involving Indian commerce. *See Morton,* 417 U.S. at 551-53. Rather, the Constitution grants Congress absolute control over all Indian matters. *See id.* Even more salient, with the ratification of the

Constitution, the States gave up all powers previously held with respect to Indian matters. *See Coeur d'Alene,* 521 U.S. at 268 (stating "the plan of the [Constitutional] Convention did not surrender Indian tribe's immunity for the benefit of the States."); *Blatchford,* 501 U.S. at 782. In other words, in 1789 the States surrendered all authority over Indian affairs and reserved none for themselves.

This situation is reflected in the text of the Constitution itself, which granted the United States sole power to regulate all relations with Indian tribes. *Morton,* 417 U.S. at 551-53. This constitutional grant was made in direct response to problems caused by the previous division of authority between the national government and the States under the Articles of Confederation. *See Worcester*, 31 U.S. at 559.

During colonial times settlers encountered tribes that were entirely self-governing political communities, formed long before the first encounters with Europeans. *National Farmers Union Ins. Cos. v. Crow Tribe* (1985) 471 U.S. 845, 851. The European colonists recognized the tribes they encountered as independent sovereign powers. *Worcester*, 31 U.S. at 546. Relations with these tribes were conducted by individual colonial governments, and are embodied in treaties between independent sovereigns. *See, e.g. Worcester*, 31 U.S. at 542-48; *Johnson v. M'Intosh* (1823) 21 U.S. 543, 600-04; Felix S. Cohen, (1942) Handbook of Federal Indian Law 46-47 ("Handbook").

After independence from England, the practice of dealing with tribes as independent sovereigns continued under the first government of the United States. *See generally, e.g.,* Cohen, Handbook at 49-66. Considerable confusion developed under the Articles of Confederation as to whether the individual States or the national government had authority over Indian affairs. *See e.g., Cherokee Nation v. Georgia* (1831) 30 U.S. 1, 17 ("*Cherokee Nation*"); *County of Oneida v. Oneida Indian Nation* (1985) 470 U.S. 226, 231 ("*Oneida*").

For example, Article IX of the Articles of Confederation conferred on Congress "the sole and executive right and power of . . . regulating the trade and managing all affairs with the Indians," but only with respect to those Indians who were "not members of the States." However, Article IX of the Articles of Confederation conferred this power with the caveat that "the legislative right of any State within in its own limits be not infringed or violated." Further, Article VI of the Articles of Confederation recognized the right of individual States to take up arms if it "received certain advice of a resolution being formed by some nation of Indians to invade such State." Thus, the Articles of Confederation themselves gave overlapping, conflicting and potentially vexing authority to both the national government and the States.

Indeed, as James Madison lamented, the division of responsibility over Indian affairs between the national government and the States was a source of "frequent perplexity and contention in the federal councils." Madison opined:

> [H]ow the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible.

The Federalist No. 42 at 269 (Madison) (C. Rossiter ed., 1961). Consequently, due to the confusion surrounding Indian affairs a number of States undertook actions with respect to tribes that seemingly conflicted with the grant of authority to the national government. For instance, New York made several treaties with a number of Tribes. *See Cherokee Nation*, 30 U.S. at 17; *Oneida*, 470 U.S. at 231. Other States construed the "ambiguous phrases which follow the grant of power to the United States [in the Articles] . . . as to annul the power [of the national government] itself." *Worcester*, 31 U.S. at 559.

Accordingly, the question of state relations with Indian tribes was much on the minds of delegates to the Constitutional Convention of 1787. The Constitutional Congress resolved the issue by surrendering to the national government all power to make treaties (Art. I, §10; Art. II, § 2, Cl. 2) with Indian tribes as well as all power to regulate "Commerce . . . with the Indian tribes." (Art. I, § 8, Cl. 3).

Interestingly, pursuant to the undisputable position of the Tribes as separate, distinct, and independent sovereigns at the time of the Constitutional Convention, these were the ***only*** powers ***any*** governmental component of the national union had with respect to Indian tribes.

The nature of the grant of authority to Congress over Indian affairs must be viewed within this context. Viewed through this lens, the grant of authority is absolute, providing Congress with the right take any action with respect to Indian tribes. The United States Supreme Court explicitly recognized this historical context in *Morton* by stating:

> Resolution of the instant issue turns on the unique legal status of Indian tribes under federal law and upon plenary power of Congress, based on a history of treaties and the assumption of a 'guardian ward' status, to legislate on behalf of federally recognized Indian tribes. The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself.

Morton, 417 U.S. at 551-52.

Congress has the constitutional authority to take any action with respect to Indian affairs, including the authority to honor the inherent immunity of Indian tribes, which originates in the Tribe's status as separate and distinct sovereigns. *Three Affiliated Tribes*, 476 U.S. at 890-911; *Santa Clara Pueblo*, 436 U.S. at 57-58; *Wheeler*, 435 U.S. at 1086. Accordingly, under *Gregory*, any action on the part of

Congress with respect to tribal sovereign immunity is constitutionally valid and does not violate the Tenth Amendment.

Although, interesting the Tenth Amendment and Guaranty Clause arguments put forth by the FPPC are nothing more than an academic exercise. The FPPC's Tenth Amendment analysis, as the Superior Court properly recognized, does not answer the fundamental and dispositive issue in this case: whether tribal sovereign immunity bars compulsory state court processes initiated against the Tribe to enforce the provisions of the PRA. Rather, as the court below stated:

> [T]he issue is resolved by federal case law recognizing tribal immunity from suit arising from particular tribal activities whenever Congress has not expressly abrogated the immunity or the tribe has not expressly waived its immunity from suit with respect to those activities.

(CT, p. 452). As shown above, the federal case referred by the Superior Court is clear. The Tribe is immune from suit unless either Congress or the Tribe has waived the Tribe's inherent, pre-constitutional sovereign immunity. This is so irrespective of any constitutional claims the FPPC attempts to put

III. WHETHER THE POLITICAL REFORM ACT APPLIES TO THE TRIBE IS IRRELEVANT TO THE ISSUE PRESENTED HERE.

The FPPC spends considerable space in its opening brief arguing that the Tribe is subject to state regulation under the PRA. (AOB, pp. 6-23). The court below correctly found this issue

irrelevant to the issue of whether the FPPC can initiate a state court enforcement action against the Tribe. Thus, without conceding this issue, the Tribe asserts that the question of whether the State is authorized to impose the PRA's reporting requirements on the Tribe is beside the point. The dispositive issue here is that the suit brought by the FPPC against the Tribe is barred by the doctrine of tribal immunity.

Similarly, in its opening brief, the FPPC asserts that the Tribe is a person, as defined in the PRA and therefore, subject to regulation under the PRA. Again, the FPPC misses the point with respect to this argument. Although the Tribe in no way concedes that it is subject to regulation under the PRA, the scope of the FPPC's regulatory authority has no bearing on the critical issue of whether the Tribe is immune from a state court action to enforce the provisions of the PRA.

The FPPC also argues that because the federal government regulates tribal contributions to federal elections by including Indian tribe within statutory definition of "person" under the Federal Election Campaign Act ("FECA"), 2 U.S.C §431(11) the same is true under the PRA. The FECA however, as the FPPC recognizes is a federal statute. As is discussed below, the Tribe is subject to the plenary power of Congress. Therefore, Congress has the authority to include

Tribe's within the statutory structure of federal election and campaign laws. The same is not true of the State.

Further, even if the State had the authority to do so, there is no indication that the PRA ever intended to include tribes within the definition of persons subject to the Act. First, the term Indian tribe is conspicuously missing from the long string of individuals or entities listed with in the definition of person. Additionally, as the FPPC argued in its opposition to the Tribe's motion to quash, historically tribes were not significant participants in State electoral campaigns. (CT, p. 42). As the FPPC admits, at the time the Act was passed tribes were not a consideration of the drafters due to their limited role in the State political process. (*Id.*) Therefore, tribes were not included within the coverage of the term person, quite simply because they were not intended to be included.

The FPPC has pointed to no reference in the Act or the legislative history thereto that shows that the Act was intended to apply to tribes. If the State of California wished to include tribes within the coverage of the PRA it should have done so within the text of the Act itself. It did not. If it wishes to do so now, the State can use its own political process to amend the PRA.

Nonetheless, as the Superior Court noted, the Tribe is a distinct sovereign political entity, subject only to the authority of the federal government, the State does not have the authority to treat the Tribe as

a "person" within the meaning of the PRA. (RJN, Ex. A, p. 8; *see also Morton,* 417 U.S. at 551-552. But again, this issue is beside the point. Even if the Tribe were considered a "person" subject to regulation under the PRA the doctrine of tribal sovereign immunity insulates the Tribe from any and all compulsory state court processes initiated by the FPPC to enforce the PRA against the Tribe.

CONCLUSION

The controlling issue of this case is the Tribe's inherent sovereign immunity from suit. The Superior Court properly recognized, under the applicable federal and California case law, the Tribe is immune from suit in all instances unless either the Tribe or Congress has expressed a clear and unequivocal intention to waive tribal sovereign immunity. (CT, pp. 450-54). This is in harmony with established precedent. *See e.g. Kiowa,* 523 U.S. at 754; *Potawatomi,* 498 U.S. at 510-11. Further, the Superior Court's ruling harmonizes with the fact that courts recognize tribal sovereign immunity as a mandatory doctrine that courts must apply in every instance irrespective of the merits of the claim against the Tribe or the particular interests of the State. *See e.g. Kiowa*, 523 U.S. at 754; *Potawatomi*, 498 U.S at 510-11; *Puyallup,* 433 U.S. at 165-73; *U.S. Fidelity and Guaranty*, 309 U.S. at 51; *Pan American*, 884 F.2d at 419; *Quechan*, 595 F.2d at 1155; *Redding Rancheria*, 80 Cal.App.4th at 389. Additionally, the Tribe's inherent immunity from suit is an

aspect of the Tribe's historic sovereignty, which is not subject to diminution by the States. *Kiowa,* 523 U.S. at 756; *Three Affiliated Tribes,* 476 U.S. at 891; *Redding Rancheria*, 80 Cal.App.4th at 389. Thus, the FPPC cannot circumvent or void the Tribe's immunity by attempting to couch the issue in inapplicable States' rights arguments.

In light of the foregoing, it is axiomatic that the Tribe is immune from suit. Based on the established law on the issue of tribal sovereign immunity as applied to the facts of this case, the Superior Court below ruled that the FPPC's enforcement action against the Tribe is barred by the doctrine of tribal immunity from suit. This opinion is consistent with the United States Supreme Court's sovereign immunity jurisprudence as expressed most recently in *Kiowa* and *Potawatomi.* Further, the ruling below is consistent with this Court's own precedent as established in *Redding Rancheria.*

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Therefore, the Tribe respectfully requests this Court of Appeal affirm the Superior Court's ruling and dispose of this action accordingly.

DATED: January 13, 2004

Respectfully submitted,

SANTA ROSA INDIAN COMMUNITY OF THE SANTA ROSA RANCHERIA dba PALACE BINGO AND PALACE INDIAN GAMING

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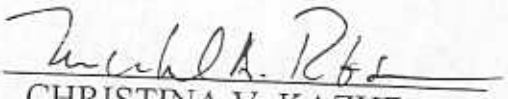
By: 

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PROOF OF SERVICE

I declare that I am employed with the law firm of Monteau & Peebles LLP, whose address is 1001 Second Street, Sacramento, California 95814-3201. I am employed in Sacramento County, California. I am over the age of 18 and am not a party to this case.

On the date indicated below, I served the following documents(s) described as

RESPONDENT'S BRIEF

on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

Steven Russo Chief of Enforcement Fair Political Practices Commission 428 J Street, Ste. 620 Sacramento, CA 95814-2329 Plaintiff/Appellant	Charity Kenyon, Esq. Riegels Campos & Kenyon, LLP 2500 Venture Way, Suite 220 Sacramento, CA 95833 Attorney for Plaintiff/Appellant Fair Political Practices Commission
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California Supreme Court 350 McAllister Street, Room 1295 San Francisco, CA 94102 (5 copies)	

____ (BY MAIL) I am readily familiar with the business practice for collection and processing of correspondence for mailing, and that correspondence, with postage thereon fully prepaid, will be deposited with the United States Postal Service on the date noted below in the ordinary course of business, at Sacramento, California.

_____ (BY PERSONAL SERVICE) I personally delivered such envelopes by hand to the office(s) of the addressee(s).

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed at Sacramento, California, this 14th day of January 2004.

CHERYL EWING